

**U.S. Department of Labor**

Benefits Review Board  
200 Constitution Ave. NW  
Washington, DC 20210-0001



RAMON RIVERA	)	BRB No. 17-0438
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AMERI-FORCE	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY	)	DATE ISSUED: 02/28/2020
ASSOCIATION LIMITED	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
RAMON RIVERA	)	BRB No. 19-0074
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AMERI-FORCE	)	
	)	
and	)	ORDER on MOTION
	)	for RECONSIDERATION
SIGNAL MUTUAL INDEMNITY	)	EN BANC
ASSOCIATION LIMITED	)	
	)	
	)	and
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney's [Fees] on Remand and the Compensation Order Denial of Attorney Fees on Reconsideration of David A. Duhon, District Director, United States Department of Labor.

Arthur J. Brewster and Jeffrey P. Briscoe, Metairie, Louisiana, for claimant.

Edward S. Johnson and Christopher L. Williams (Johnson Yacoubian & Paysse), New Orleans, Louisiana, for employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD, ROLFE, GRESH and JONES, Administrative Appeals Judges.<sup>1</sup>

BOGGS, Chief Administrative Appeals Judge:

Employer has filed a timely motion for reconsideration en banc of the Board's Order on Motion for Reconsideration in *Rivera v. Ameri-Force*, BRB No. 17-0438 (Feb. 28, 2018), *aff'd in part and modified in part on recon.*, (Oct. 24, 2018) (Buzzard, J., concurring and dissenting). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimant responds, urging the Board to deny employer's motion and to affirm the Order on Motion for Reconsideration. We grant employer's motion for reconsideration en banc. 20 C.F.R. §§802.407(d), 802.409.

Additionally, claimant appeals the Compensation Order Award of Attorney's [Fees] on Remand and the Compensation Order Denial of Attorney Fees on Reconsideration (OWCP No. 07-306441) of District Director David A. Duhon rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

The facts of this case are not in dispute and are set forth fully in the Board's original decision, *Rivera*, slip op. at 2-3 (Feb. 28, 2018). However, we shall briefly reiterate the relevant procedural history.

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<sup>1</sup> Administrative Appeals Judge Ryan Gilligan, who was on the panel that previously decided the case, is no longer with the Benefits Review Board. 20 C.F.R. §802.407(a).

In July 2015, claimant learned he had a hearing loss for which he filed a claim in November 2015. Within 30 days of receiving notice of the claim, employer paid claimant \$292.90, representing two weeks of benefits based on an average weekly wage of \$212.17; it then filed a notice of controversion. Cl. B, C; Emp. C at exh. J; Emp. D at exhs. B, C.<sup>2</sup> Following proceedings before the Office of Workers' Compensation Programs (OWCP), the parties signed a Section 8(i), 33 U.S.C. §908(i), settlement agreement for \$25,151.05 in permanent partial disability benefits and \$5,000 in medical expenses. Emp. Resp. Br. (BRB No. 19-0074) at exh. A.

Claimant's counsel filed a fee petition for work performed before the OWCP, requesting a fee of \$8,153.16. Emp. D. Employer objected, arguing that neither Section 28(a) nor Section 28(b) is applicable and that counsel's fee must be obtained as a lien against claimant's benefits pursuant to Section 28(c). 33 U.S.C. §928(a), (b), (c); Emp. C. Other than identifying it as a raised issue, the district director did not address claimant's counsel's entitlement to a reasonable attorney's fee under Section 28(a). Rather, he applied Section 28(b) and held employer liable for counsel's requested fee. Comp. Order (April 21, 2017).

Employer appealed, asserting the district director erred in applying Section 28(b) to hold it liable for counsel's fee. The Board reversed the fee award, holding the Section 28(b) criteria were not met because employer did not refuse the claims examiner's recommendation dated September 7, 2016. *Rivera*, slip op. at 4-5. The Board remanded the case for the district director to consider counsel's entitlement to an attorney's fee under Section 28(c), if counsel had raised this issue.<sup>3</sup> *Id.* at 5 n.4. On claimant's motion for reconsideration, the Board affirmed its Section 28(b) holding; however, a majority of the panel accepted claimant's argument that the case should have been remanded for consideration of employer's liability for a fee under Section 28(a). *Rivera*, slip op. at 2-3 (Oct. 24, 2018) (*Rivera Recon.*). The dissenting judge concluded claimant had conceded the inapplicability of Section 28(a) in his initial response brief to the Board and cannot raise an argument on its applicability based on *Taylor v. SSA Cooper, LLC*, 51 BRBS 11 (2017), for the first time in a motion for reconsideration.<sup>4</sup> *Rivera Recon.*, slip op. at 4-5.

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<sup>2</sup> Unless otherwise stated, citations are to the administrative file in BRB No. 17-0438 and not to exhibits attached to the parties' briefs on reconsideration or on appeal in BRB No. 19-0074.

<sup>3</sup> Other than to acknowledge it was not applicable, the Board did not address Section 28(a). *Rivera*, slip op. at 5 n.4.

<sup>4</sup> In *Taylor*, a case where the claimant sought both medical and disability benefits, and the employer paid only medical benefits within 30 days of having received notice of

## **Employer's Motion for Reconsideration in BRB No. 17-0438**

Employer requests en banc reconsideration of the Board's order on reconsideration remanding the case for the district director to consider the applicability of Section 28(a). Claimant responds, urging the Board to deny employer's motion.<sup>5</sup> Employer contends the Board erred in remanding the case to the district director for consideration of Section 28(a) because, although claimant raised Section 28(a) before the district director, he conceded its inapplicability in his response brief before the Board. Therefore, he was precluded from raising Section 28(a) and *Taylor* in his motion for reconsideration. We agree with employer.

In his brief responding to employer's appeal of the fee award, claimant urged affirmance of the fee award under Section 28(b) but also acknowledged: "employers have made it common practice to make an initial payment of minimal compensation [within 30 days of the notice of the receipt of the claim]. This justifiably negates the employer's liability under Section 928(a)," and employer, here, "engaged in the same legitimate practice. . . ." Cl. Resp. at 16. Employer asserts this is a concession of the inapplicability of Section 28(a) or is a waiver. The Supreme Court has defined "waiver" as: "the intentional relinquishment or abandonment of a known right." *Hamer v. Neighborhood Housing Services of Chicago*, 138 S.Ct. 13, 17 n.1 (2017); *see also Hoodho v. Holder*, 558 F.3d 184, 191 (2d Cir. 2009). Claimant's statement in his response brief is an explicit concession that employer's action in this case "negated" its liability for a fee under Section 28(a). *See id.*; *cf. Formoso v. Tracor Marine, Inc.*, 29 BRBS 105 (1995) (failure to respond to an argument is not an admission). As he specifically conceded Section 28(a) is not applicable, the Board should not have granted reconsideration and remanded the case on this issue.

Moreover, even though claimant was successful in obtaining an employer-paid fee under Section 28(b) before the district director, he could have raised Section 28(a) in conjunction with *Taylor* as an alternate means of affirming the district director's fee award in his response to employer's appeal. The Board has long held it will entertain issues raised

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the claim for compensation, the Board held the employer is liable for an attorney's fee under Section 28(a) because the claimant was successful in obtaining the denied disability benefit. In his motion for reconsideration to the Board in this case, claimant asserted entitlement to an employer-paid fee under Section 28(a), alleging employer failed to pay medical benefits within the 30-day period.

<sup>5</sup> We reject claimant's assertion that employer's motion for reconsideration is moot because it obtained a favorable decision from the district director on remand. *See infra*.

in a response brief that support the decision below. *Reed v. Bath Iron Works Corp.*, 38 BRBS 1 (2004); *Crum v. General Adjustment Bureau*, 16 BRBS 101 (1983); *King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87 (1983). If claimant believed *Taylor* supported his claim for an employer-paid attorney's fee under Section 28(a), in the event employer's appeal on Section 28(b) was successful, he could have brought it to the Board's attention in his response brief.<sup>6</sup> Instead, he did the opposite by explicitly conceding employer is not liable for his fee under Section 28(a). Therefore, the Board, in its original decision, properly did not remand the case for the administrative law judge to consider the issue. *Rivera*, slip op. at 4-5.

Consequently, we vacate the Board's order remanding the case to the district director for consideration of the applicability of Section 28(a), *Rivera Recon.*, slip op. at 3, and we reinstate the initial order remanding the case for consideration of counsel's entitlement to an attorney's fee under Section 28(c), if raised by counsel, *Rivera*, slip op. at 5 n.4. In all other respects, the Board's Order on Motion for Reconsideration is affirmed.<sup>7</sup>

### **Claimant's Appeal in BRB No. 19-0074**

Shortly after the Board issued its order on reconsideration, and before it received employer's motion for reconsideration en banc, the district director took action in accordance with the remand order, addressing the applicability of Section 28(a). He denied counsel an employer-paid fee under Section 28(a), and, on claimant's motion for

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<sup>6</sup> The Board issued *Taylor* on June 30, 2017. Claimant had ample opportunity to raise it either in his original response brief, filed August 4, 2017, or, possibly, in a supplemental brief prior to the Board's issuance of its initial decision on February 28, 2018. 20 C.F.R. §§802.212, 802.215. Claimant changed his position on Section 28(a) based on *Taylor* only after receiving the Board's adverse decision on Section 28(b).

<sup>7</sup> A unanimous panel of the Board fully addressed and decided in its original decision that employer is not liable for an attorney's fee under Section 28(b). The same panel unanimously affirmed this holding on claimant's motion for reconsideration. *Rivera Recon.*, slip op. at 2. Employer did not challenge this holding in its motion for reconsideration en banc. Therefore, the Board's holding regarding the inapplicability of Section 28(b) is the law of the case. See *Schwirse v. Marine Terminals Corp.*, 45 BRBS 53 (2011), *aff'd sub nom. Schwirse v. Director, OWCP*, 736 F.3d 1165, 47 BRBS 31(CRT) (9th Cir. 2013) (fully-addressed issue is law of the case); *Irby v. Blackwater Security Consulting*, 44 BRBS 17 (2010); *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005); *Ravalli v. Pasha Maritime Services*, 36 BRBS 91 (2002) (en banc).

reconsideration, reaffirmed his denial. Claimant appeals the district director's orders on remand, asserting he erred in denying an employer-paid fee under Section 28(a).<sup>8</sup> Employer responds, urging affirmance.

Because we have vacated the Board's order remanding the case for consideration of employer's liability under Section 28(a), the district director's order addressing that issue is a nullity.<sup>9</sup> See *Jackson v. FIE Corp.*, 302 F.3d 515, 522 (5th Cir. 2002); see generally Fed. R. Civ. P. 60(b)(4). Thus, there is no effective order for claimant to appeal, and we dismiss claimant's appeal in BRB No. 19-0074.

Accordingly, we vacate that portion of the Board's Order on Motion for Reconsideration in BRB No. 17-0438 remanding the case to the district director for consideration of the applicability of Section 28(a), *Rivera Recon.*, slip op. at 3, and we affirm all other aspects of the Board's Order on Motion for Reconsideration. We reinstate the remand order in the Board's original Decision and Order, *Rivera*, slip op. at 5 n.4, vacate the district director's orders, and dismiss claimant's appeal in BRB No. 19-0074.

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<sup>8</sup> Claimant also asks the Board to reverse its decision denying an employer-paid attorney's fee under Section 28(b). As stated, that decision is the law of the case. See n.7, *supra*.

<sup>9</sup> We note the district director was without jurisdiction to issue an order on remand, as the time for filing a motion for reconsideration to the Board had not yet elapsed and the Board retained jurisdiction. 33 U.S.C. §921(b)(5); *Colbert v. Nat'l Steel & Shipbuilding Co.*, 14 BRBS 465, 468 (1981); see also *L.D. v. Northrop Grumman Ship Systems, Inc.*, 42 BRBS 1, *recon. denied*, 42 BRBS 46 (2008); *Bartley v. L&M Coal Co.*, 7 BLR 1-243, 1-248 (1984); 20 C.F.R. §802.407(a).

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

We concur:

GREG J. BUZZARD  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge

ROLFE and GRESH, Administrative Appeals Judges, concurring and dissenting:

We respectfully dissent from our colleagues' decision granting employer's motion for reconsideration and their holding that the Board should not have remanded the case for the district director to address the applicability of Section 28(a). As stated in the Order on Motion for Reconsideration, we reject the assertion that the Board should not have permitted claimant to raise his Section 28(a) argument in his motion for reconsideration. As claimant raised the issue before the district director, it was not forfeited. Further, claimant was not "aggrieved" by the district director's failure to address whether he is entitled to an attorney's fee under Section 28(a) until the Board held he is not entitled to an employer-paid fee under Section 28(b). 20 C.F.R. §802.201. Only when employer was relieved of fee liability under Section 28(b) did claimant become an "aggrieved" party and, therefore, he could then raise the issue the district director did not address. Prior to that, he was not obliged to file a cross-appeal challenging his fee award. 20 C.F.R. §802.211.

Moreover, while claimant could have raised Section 28(a) as an issue in his response brief in support of the district director's fee award, claimant's statement in his response brief was filed when he was not an "aggrieved" party and, therefore, was not an "intentional relinquishment" of a known right such that it constitutes a binding waiver forever precluding the Section 28(a) issue from being raised and addressed. *See Hamer v. Neighborhood Housing Services of Chicago*, 138 S.Ct. 13, 17 n.1 (2017). Instead, as before, we would remand the case to the district director for a clear decision in the first instance on the merits of the Section 28(a) issue – an issue raised but not previously

addressed. Accordingly, we would deny employer's motion for reconsideration and reaffirm the Board's Order on Motion for Reconsideration in its entirety.<sup>10</sup>

JONATHAN ROLFE  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge

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<sup>10</sup> We agree the district director ruled prematurely on remand, as he lacked jurisdiction because the case was still pending before the Board. Thus, we would remand for the district director to again address the Section 28(a) issue.